No. 11288

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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MIKE RADICH and C. T. BROWN, etc.,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA, etc. *et al.*,

*Appellees.*

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## APPELLANTS' REPLY BRIEF.

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### Preliminary Statement.

To date appellants have been served with two appellees' briefs; that of the Government and that of the appellees Otto Davis and Melvin Myers.

Other appellees' briefs might be filed; but in order not to permit the time for appellants' reply to lapse as to the briefs already served, and on the assumption that such other briefs will largely follow the contentions of the two appellees' briefs at hand, we answer them now, asking leave to meet the contentions of any subsequent brief that may be filed, at the time of the oral argument.

## Answer to Brief of Appellees Otto Davis and Melvin Myers.

Very little need be said with respect to the brief of the appellees Otto Davis and Melvin Myers.

They state that we are trying to fasten liability on the respondent or appellee Walter S. Roeder. However, our primary purpose is to show that the operator of the tractor was outside and beyond the scope of his employment. The question whose special servant he was, or whether he was anybody's special servant at the moment of the accident is only a secondary one. It is important only in the event that it should be held—and we do not see how this is possible in the light of the evidence—that the tractor and its operator got into the hands of the defendants subsequent to Galen Finch with either the knowledge or the consent of the appellants.

We say that not one shred of evidence justifies the conclusion that the tractor and its operator ended its journey with the defendant Walter S. Roeder with either the knowledge or consent of the appellant herein.

Should appellants be the general employers, and all appellees successively special employers, then and in that event only would the authorities cited in all the briefs be relevant to the question at bar. It is the contention of appellants that even when it is assumed in the face of the contrary evidence that Roeder's use of the equipment was authorized, he exercised such complete control over the operator and the equipment when actual work was going on, that the special employer alone became responsible.

## Reply to the Brief of the Government.

Turning now to the brief of the Government, we know the court will not lose sight of the primary position of the appellants that their equipment found its way onto the airport against their wish and instructions and that they themselves would not have permitted it to go there. It was leased out for agricultural purposes to be worked under the direction of Galen Finch. It found its way into the hands of somebody whom Galen Finch did not know and of whom he—to say nothing of appellants—had never heard. It ended up—not on a quiet orange grove—but on a military airfield on which military traffic was going on, and was used under the direction of entire strangers both to Galen Finch and the appellants herein.

## Reply to the Government's Statement of Facts.

The Government maintains that the operator of the tractor received no instructions from appellants "prohibiting him from working with the tractor on any other job". This remark, while literally correct, does not mean that in the absence of such a prohibition the operator of the tractor was at liberty to work anywhere. It is elementary that if an agent receives instructions to go to Galen Finch and to do agricultural work at a specifically designated spot, it is not necessary for the principal to tell this agent "I hereby issue a prohibition against your doing work anywhere else or for anyone else."

If a custom had been shown by which the operator had been allowed on previous occasions to roam at will and to find work with the tractor wherever it could be found and that this custom was known to the defendants herein,

perhaps the absence of a prohibition would have some meaning, but as it is it cannot be of any significance.

The Government also says that only the appellants had the right to discharge Clarence Davis, the operator. If that means that the special employer had no power to discharge the operator from the job then being done by the special employer, the Government is in serious error. Under the unanimous proof Finch had the right to reject and send home the driver. To that extent he had the right to discharge the operator. It is absurd to maintain that the special employer, before he can be held liable, must have the right to discharge the servant, *not from his special employment* BUT FROM THE GENERAL EMPLOYMENT. The Government cannot seriously contend this, and a reasonable view of the cases does not lend support to so ridiculous a view. The control of the special employer is complete if the special employer is no compelled to retain the employee *in his special employ.* As stated, the evidence is unanimous and uncontradicted that the special employee could have been sent home by his special employer at any time.

The Government also claims that the operator of the tractor was never the agent of the lessee and that the lessee had only the right to tell him where to work and what work was to be accomplished. This is wrong.

As we pointed out, the lessees exercised a far wider control. If the specific facts testified to are matched against the general statements that are loosely used throughout the record, it will be found that the mode of accomplishing the work, the place where the work was to be performed, indeed every specific matter except the actual pushing of the levers and shifting of gears was

under the control of the persons on the airport. At the risk of tiring the court, we shall quote from the testimony of *Jesse M. Cox,* the man who was in charge of the activities of Roeder at the particular time and place. He said:

"Q. And then did Mr. Davis proceed with the operation of the bulldozer on the strip that you had put the stakes in for him? A. Yes, sir.

Q. And what were you doing at that time? A. While he was leveling that one side down I was setting stakes over on the other side of the airplant.

Q. In other words, there were two strips that you were working on? A. Yes, sir.

Q. And where was that one strip that he was working on with reference to the strip you were putting the new stakes down on? A. That was on the east side of the airplane that was parked on the taxiway there.

Q. Were you working on the west side of the airplane? A. Yes, sir.

Q. Do you know how many times the bulldozer went over that one strip that he first started working on? A. Yes. He made three passes over it.

Q. What do you mean by 'three passes'? A. Well, he made three round trips. He took his dozer, knocked it down and then drug back and knocked it down again and would drag back.

Q. Would he start from the place and go forward? A. Yes, sir.

Q. And how long would you say that strip was in feet? A. Oh, approximately 700 feet.

Q. And then would he be back up after he got to the other end and drop his blade and scrape it? A. Yes, sir.

Q. So he would be in reverse on his way back to the plane, is that correct? A. That is right.

Q. And he made three of those round trips, as you call it? A. Yes, sir.

Q. And after he completed that part of the strip what did Mr. Davis do? A. *Well, Mr. Davis asked me if we would have to plank across the taxiway this plane was parked on—it was parked on what they call a 'hard stand' and there was a strip of paving went on back, I believe, to the wash rack in the back and he asked me if we would have to plank across that and I told him no, I didn't think it was necessary; that he could go around it.*

Q. *And did he?* A. *Yes, sir.*" (Italics ours.) [Tr. pp. 146-147.]

"Q. By Mr. Hart: What did Mr. Goodine do while he was there? A. He told the operator—gave the operator his instructions to level down—where to level.

Q. And what were those instructions? A. *To go right down those stakes I had set. I had a center row of stakes and he told him to level it down—his blade was wide enough—and just center his blade on the stakes and knock them down.*

Q. Who had installed the stakes? A. I did.

Q. And prior to the collision between the bulldozer and the airplane what did you say, if anything, to the operator? A. I didn't say anything. The first time I talked to the operator was when he asked me if he had to plank across that taxiway.

Q. *Did you yell at him to warn him of his approach toward the plane?* A. *Yes.*" (Italics ours.) [Tr. p. 149.]

"Q. And Hank was the man you asked about getting the bulldozer? A. I didn't ask.

Q. Who asked him? Your boss? A. Mr. Roeder.

Q. And you were there? A. Yes, sir.

Q. And did you and Hank go over to the edge of this runway or this strip together when the planking was laid for the dozer to cross it? A. Yes, sir.

Q. *Who helped that—lay that planking across the taxiway?* A. *Hank.*

Q. *No one from Radich & Brown?* A. *No.*

Q. Just Hank and yourself? A. Yes, sir.

Q. Now, this leveling was to be done in order that certain water mains could be laid, isn't that true? A. Yes, sir.

Q. Was the leveling to be done on each side of this strip? A. Yes, sir.

Q. How many rows of stakes in all were necessary? A. There was one row.

Q. On each side of the strip? A. On each side of the strip, yes.

Q. That would be two in all? A. Yes.

Q. And in order to level the ground how many passes would the dozer make on each side of the strip? A. Well, he made three passes on one side and one pass, one round pass on the other side.

Q. How long before he go there with the dozer were the stakes set by you? A. Oh, approximately three or four minutes.

Q. In other words, you were just a little bit ahead of him getting the stakes in the ground before he started knocking them down? A. No; they were finished.

Q. So all of the stakes had been set? A. No.

Q. When he arrived with the dozer? A. No. All of those on the east side had been set.

Q. He arrived then with the dozer on the east side first? A. Yes, sir.

Q. And you had already set all of those stakes? A. Yes, sir.

Q. What did you say to him about hitting the stakes? A. I didn't say anything.

Q. Who told him anything about hitting these stakes? A. Hank.

Q. Hank told him that? A. Yes, sir.

Q. *Neither Mr. Radich nor Mr. Brown, so far as you know, told him how to hit any stakes?* A. *No, sir, not that I know of."* (Italics ours.) [Tr. pp. 150-151.]

"Q. Did you see him knock down any of the stakes on the west side? A. The last one, yes.

Q. And you were 300 feet away at that time? A. Yes, sir.

Q. Is that when you started to shout at him or yell at him or something? A. No, sir.

Q. When was that? A. That is when he backed into the airplane.

Q. How far away from you was he a that time? A. Well, as he started backing towards the airplane I started walking over that way to see if the leveling was okay on the east side of the plane.

Q. And that was the east side of the strip? A. Yes, sir.

Q. And did you intend to see if it was okay on the west side of the strip too? A. I could see that.

Q. You had already determined that? A. Yes, sir.

Q. As foreman it was part of your work to determine whether it was all right? A. Well, yes.

Q. And if it had not been all right what would you have done? A. I would have went and talked to Hank.

Q. You would have talked to Hank? A. That is right.

Q. Did Hank have anything to do with this leveling there? A. Nothing, only to tell the operator that he wanted it level, as far as I know.

Q. I understood you to say it was Mr. Roeder who approached to see that the dozer would come over there." [Tr. pp. 153-154.]

It will be noted here that Mr. Cox would not have gone to the appellants to have the appellants transmit instructions to the operator of the tractor, for indeed the appellants were not known to him. He would have gone to Hank Goodine, another total stranger to the appellants, to whom they had not relinquished, either by contract or otherwise, the lease of this particular equipment.

In spite of this, the Government persists in its unrealistic approach and actually says, on page 8 of its brief:

> "The hirer described the work to be done, appellants described how it was to be done."

The fact is that the hirer was Galen Finch, who did not know where the equipment was and who certainly did not do anything about describing the work to be done, and the appellants were nowhere on the spot. They did not

know where the equivalent was. It was on the airport contrary to their instructions to Galen Finch, and if they had been there they could not have described how it was to be used, because they did not know and could not know what was to be done. The entire record, therefore, shows that the control rested with and was assumed by the appellees herein and that the operator of the tractor had so completely stepped out of his role of employee and beyond the scope of his employment that nothing which he did or which happened at the time can be said to have been under the control of appellants.

### The Government's Authorities Distinguished.

The Government correctly states on page 7 of its brief that the fact in each case determines the applicability of the authorities to a given situation. However, in thereafter citing the cases which it does, it promptly proceeds to forget its own admonition.

In all of the cases which the Government cites there is nowhere a situation in which the user of the equipment had no contract with the general employer himself, but sought to obtain such contractual rights through the intermediation of three distinct other individuals, the first of whom was under a clear injunction not to let the equipment go anywhere else and not to permit it to perform anything but agricultural operations.

This should be sufficient to brush aside the general and special employment proposition in this case and look straight at the actual facts, to-wit, that we find an employee of the appellants far from the course and clear outside the scope of the mission on which he had been sent.

In discussing the various cases which the Government presents in support of its contention, we shall not again allude to the above distinction, but shall point out other distinguishing features showing that even on the theory of general and special employment the position of the government is untenable.

Enough has already been said in our opening brief of the distinguishing features between the case at bar and the *Billig v. So. Pac.* case. In the case at bar, the persons for whom the leveling work was done were present during the operation of the tractor and assumed control over its work; but in the *Billig* case the driving of the truck, the route which it was to follow, and all matters pertaining to its actual movement were no concern of the alleged special employer.

The case of *Stewart v. California Improvement Company,* 131 Cal. 125, does not parallel, as closely as the Government would have us believe, the situation in the case at bar. In that case, the injury was caused through the emission of steam from the steam roller in a negligent fashion while a horse was close by.

It is not claimed here that a wrong lever was pulled, or that there was an improper step taken with the mechanism of the tractor, but it merely went to the wrong place. *What places it should go to was, however, precisely the thing which Roeder assumed to control!*

In the case of *Boswell v. Laird,* 8 Cal. 469, architects were hired as independent contractors and the case lays down the principle that an independent contractor is liable and that the owner does not become liable for the contractor's work until after it has been accepted by the

owner. Clearly, there is no similarity between that situation and the case at bar.

The same distinction exists as to the case of *Du Pratt v. Lick,* 38 Cal. 691, in which an independent contractor repaired a sidewalk but left certain portions of it unprotected so that the plaintiff fell through and was injured. Again, the relationship of the independent contractor to the owner was discussed and it was held that the independent contractor was liable and not the owner.

The next case referred to by the Government, *McComas v. Al G. Barnes Shows Co., et al.,* 215 Cal. 685, 12 P. (2d) 630, is a case in which an elephant and a trainer were furnished for a motion picture show. The trainer of the elephant had negligently adjusted a howdah on the elephant. By reason of its negligent adjustment one of the players came to harm. Clearly, the person hiring the elephant for the show with the rider of the elephant had no control over the adjustment of this canopied seat on the elephant's back. We see a similarity to the negligent emission of steam, but no similarity to the case at bar. The Government would certainly not contend that the studio could have escaped liability if the director of the picture had placed the elephant into a scene at a particular spot, and if, in getting there, the elephant had been permitted to knock one of the players down.

The next case, *Schrimsher, et al., v. Reliance Rock Co.,* 116 Cal. App. 500, involves the hiring of a power shovel.

The situation in that case is entirely different. It is silent as to the existence of any agreement between Reliance Rock Co. and Oswald Brothers to the effect that control was in any way surrendered by one to the other. But it appeared that the Reliance Rock Co. had hired the operator *and had directed him to go to the place and to do the type of work which he was doing at the time of the accident.* Clearly, these features distinguish it from the case at bar.

We are next referred to *Carlson v. Sunmaid Raisin Growers Assn., et al.,* 121 Cal. App. 719. That case has already been discussed in our opening brief (p. 22). We called attention there to the *dictum* which distinguishes it from the case at bar.

The Government also relies on the case of *Lowell v. Harris,* 24 Cal. App. (2d) 70. In that case, the compensation of the equipment and the hired servant was on a per ton arrangement. The accident happened, as it did in the *Billig* case, while the material was being transported from one place to the other, at the time when the special employer could not exercise any control. It therefore falls within the rule laid down in the *Billig* case, but not within the realm of the facts contemplated by the case at bar.

In *Madsen v. LeClair,* 125 Cal. App. 393, the abandonment of control, in the words of the opinion, was so complete that the court could say (p. 397):

> "No one in the employ of Bryant directed Pratt as to the care or operation of the motor or hoist.

> Even Pratt said that no signals or directions were actually given as to when to hoist, that he watched the men, or the placing of the buggies on the cage, and it was customary for the engineer to use his own judgment as to when the cage was ready to go."

This leaves, of the California cases cited by the Government, only *Teller v. Bay and River Dredging Company,* 151 Cal. 209, which is readily distinguished because it again involves an independent contractor relation; and *Western Indemnity Co. v. Pillsbury,* 172 Cal. 807, which is a workmen's compensation case, where both general and special employer may ordinarily be held.

None of these authorities warrant the holding of the trial court that in this case appellants retained control of this equipment and of this employee, and that at the time and place in question they could have told him how to perform his work. It is therefore respectfully submitted that not only was the employee completely beyond the place, scope, and course of his employment, but even if at the moment he did remain the employee of the appellants herein, nevertheless the appellants had, under the general and special employment rules, so completely lost control over him as to make his acts the acts of the persons undertaking to direct the work at the airport.

What has already been said also serves to answer Point II of the Government's brief.

## Conclusion.

In conclusion, it is respectfully submitted that there was a complete break in the chain of employment; that the employee had completely stepped out of the role and mission for which he had been sent to the first special employer, Galen Finch; and that therefore the judgment against the appellants herein was erroneous.

It is submitted, moreover, that should Galen Finch in fact be a special employer of the operator of the equipment and that the operator and the equipment rightfully found their way to the time, place, and to the conditions under which the accident occurred, then and in that event the control of the employee had been so completely abandoned by appellants and the assumption of control over the employee by those directing his movements at the airport had become so complete that they alone, and not the general employer, should be held liable under the circumstances.

For the foregoing reasons it is respectfully urged that the judgment herein be reversed and that the appellants herein be held not to be responsible for the damage caused to the Government on the occasion in question.

Respectfully submitted,

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